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RIGHT TO PROPERTY: THE LAND ACQUISITION ACT 1960 AND THE SHARIAH PERSPECTIVE

ABSTRACT

Islamic law recognizes both private and community property. This community rights are manifested in forms of entitlement for charitable purposes, known as *waqf* or trusts, *sadaqah* as well as *zakat*. Under the Sha'riah, however, ownership of all property ultimately rests with God. Though individual property rights are upheld, there is a corresponding obligation to share, particularly with those in need. In Malaysia, the right to property is a constitutional right and thus, the acquiring authority cannot deprive a person of his land in an arbitrary manner. This paper discusses the extent of which the acquisition law falls in line with Shari'ah thus preserving the right to property as determined by Shari'ah to individuals. Similarly, the paper also looks at some basic principles sustained by the court in determining whether the working of the acquisition law falls within the constitutional guarantee provided under Article 13 of the Federal Constitution and the Sha'riah. A study of the case law reveals that human errors due to greediness and lack of responsibility have contributed to some of the problems in land acquisition.

Key words: *Land, Land Acquisition, Property, Shariah, Federal Constitution*

Abstrak

Hukum Islam mengenal dua bentuk kepemilikan, yaitu hak privat dan hak komunitas. Hak-hak komunitas diwujudkan dalam bentuk hak yang bertujuan sosial, yang dikenal sebagai waqaf atau trusts, sadaqah dan zakat. Dalam konteks syariah, bagaimanapun kepemilikan atas semua harta secara mutlak adalah milik Allah. Walau hak-hak individual ditegakkan, ada kewajiban orang terkait untuk berbagi, khususnya kepada yang memerlukan. Di Malaysia, hak kepemilikan harta merupakan hak konstitusional dan arena itu, pihak yang berwenangpun tidak dapat mengambil hak seseorang atas tanahnya secara semena-mena. Tulisan ini membahas masalah hukum kepemilikan sesuai dengan syariah, karenanya menjaga hak kepemilikan sebagaimana ditetapkan syariah kepada individu. Secara sama, tulisan ini mengkaji beberapa prinsip dasar sebagaimana dipertahankan oleh pengadilan dalam menentukan apakah bekerjanya hak kepemilikan tanah tersebut sejalan dengan jaminan konstitusi yang dimuat dalam Pasal 13 Undang-undang Federal dan syariah. Studi kasus ini menyatakan kesalahan manusia yang disebabkan kerakusan dan kurangnya tanggung jawab telah menimbulkan beberapa masalah terkait kepemilikan tanah.

Kata Kunci: Tanah, Kepemilikan Tanah, Harta, Syariah, Federal Constitution.

I. INTRODUCTION

The acquisition of private land by the authority is done on the basis that the general good of the whole community is paramount to that of the individual owner. It is also the responsibility of the government to ensure that adequate land is made available for public purpose. Nevertheless, to some people, land acquisition is an encroachment of individual's right to property (Marzulla, 1995, 1-27). In Malaysia, property right is guaranteed under Article 13 of the Federal Constitution 1957 which provides that:

- 1) No person shall be deprived of property save in accordance with the law;
- 2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

The above provision emphasizes for the presence of specific law providing for the acquisition of land. That law must lay down in the clearest terms any procedures for such compulsory acquisition and principles to be applied in awarding adequate compensation. Such law accords for the principle that the rights of the public prevails against the private interest. In the era of development and globalization, the demand for new physical development has called for increased use of state land by the many quarters. Some projects require specific land at specific location thus, the government may have no choice but to compulsorily acquire land for that purpose. As a result, the acquisition of private land is unavoidable and the Land Acquisition Act shall be invoked closely to ensure justice is done.

The Malaysian Land Acquisition Act 1960 (LAA No 34) was based on the Indian Land Acquisition Act 1889 (replaced by the 1894 Act). Earlier to that, the Land Acquisition Ordinance (S/S Chap 128) was introduced and came into effect on 13th December 1920. Under the Ordinance, the Governor in Council was empowered to acquire a particular land by making a Declaration under Section 5 (of the Ordinance) and to show that the particular land was needed for a public purpose, or for accompany and such Declaration shall be conclusive evidence for the purpose.

Later in 1960, the Land Acquisition Act 1960 was enacted (Act No 34 of 1960) and has been revised in 1992 (Act 486 effective from 18th March 1992). Act 486 containing eight parts with 70 sections. Based on the Act 486, Land Acquisition Act is an Act relating to the acquisition of land, the assessment of compensation to be made on account of such acquisition, and other matters incidental thereto. The presence of the Act shows that the Malaysian law recognizes individual land ownership (Section 42 of the NLC as well as article 13 of the Federal Constitution) and recognizing the fundamental right guaranteed by the Constitution to own land in Malaysia (Article 13 of the Federal Constitution 1957). Any act to acquire land is prohibited unless it is done in accordance with the law and adequate compensation is paid to all the affected parties (Article 13 (1)(2) of the Federal Constitution 1957).

The 1960 Act has a two-fold objective, firstly to provide a standard method of procedure applicable to all the states in Malaysia and secondly to serve as a speedy mechanism for acquiring land compulsorily where they are needed urgently for development purposes. If properly implemented, the Act should be able to render justice to the dispossessed owners and other affected parties and meeting the objective of providing appropriate development and infrastructure for the public. In 1998, the Land Acquisition Rules were introduced with the approval of the National Land Council. These rules govern the procedures for the acquisition of land for economic development or for any other specific purpose.

II. DISCUSSION

A. Meaning of “Property”

The term “property” is commonly used to refer to a wide range of entitlements to the use or to the benefit of various assets, including land and other fixtures. It is used to denote either rights in the nature of ownership or corporeal things, whether land or goods, which are the subject of such rights (*Countess of Bridgewater v Duke of Bolton* (1706) 6 Mod Rep 106; *Barnes v Peach* (1803) 8 Ves 604) Definition of “property right” varies by jurisdiction, customs and traditions, legislation as well as ruling of the courts depending on changing demand and priorities. For example, the scope of property rights differs in the context of real estate and intellectual property, while family law has its own principles in determining what amount to matrimonial property.

In Malaysia, the term ‘real estate’ is often used to define land in the National Land Code (Act 56), Section 5 in the Sabah Land Ordinance (Cap 68) and Section 2 in the Sarawak Land Code (Cap 81) (Hamid, 2006: 99). Section 2 of the Real Property Gains Tax Act 1976 (Act 169) defines ‘real property’ as any land situated in Malaysia and any interest, option or other rights in or over such land. As such, though the emphasis is more on the concept of ‘real estate’, it is clearly shown that the scope of “property” does not confine to the physical aspect of land but rather includes the right, interest and the options arising from the property, whether ‘real’ or ‘personal’.

The contemporary approach on the concept of “mal” or property from the Islamic perspective covers a wider scope which includes proprietary and non-proprietary rights. A modern definition

of “mal” include commercial value, corporeal, usufructuary and other rights of any kind of exchange of which is customary and is considered as having commercial value. It includes both moveable and immovable property (Anderson, 1976). The scope of the word ‘property’ can be inferred from the decision of the Supreme Court of India in *Dwarkadas Shrinivas v Sholapur Spinning and Weaving Co* [1954] which was cited with approval by the Federal Court of Malaysia in *Government of Malaysia & Anor v Selangor Pilot Association* 1975) (MLJ 2, 1975: 66) where the Indian Supreme Court said: “Having regard to the setting in which Article 31 is placed, the word ‘property’ used in the article must be construed in the widest sense as connoting a bundle of rights exercisable by the owner in respect thereof and embracing within its purview both corporeal and incorporeal rights. The word ‘property’ is not defined in the constitution and there is no good reason...to restrict its meaning (S.C 1954, 121).

The root word for “mal” is ma-wa-la which means to enrich (Al Mawrid, 1992). The discussion about “mal” is always taken place simultaneously with “milkiyyah” which means ownership, nonetheless, the concept of “milkiyyah” is wider and it includes proprietary and non-proprietary rights (Azmi, 1995). The inclusion of usufructuary rights (manfa‘ah) of tangible goods to the concept of property will certainly enhance the value of any property. Muslim scholars have discussed usufructuary rights in the context of rights issuing of, and incidental to, the rights of ownership of tangible property such as in the context of right to ‘*intifa*’ (enjoyment) and right to *irtifaq* (easement) (Mahmasani, 1948: 20-25). The question is to what extent the Malaysian law on land acquisition and the present practices take into consideration the wide concept of “mal” in determining the value of acquired land.

It is suggested that what is today regarded as property refers in general term or ‘land’ in its specific term may cease to be regarded tomorrow (*Sheoshankar v State of Government of Madhya Pradesh*, A.I.R. 1951 Nag. 58). Acknowledging the wide scope of “property”, for the purpose of this study, the scope of “property” is confined to land and anything that forms part of land (Section 5 of the National Land Code does not provide a cogent and definite definition of “land” thus the common law principles relating to “fixtures” and “chattels” are adopted for the purpose of this paper).

B. Rights to Property

It is universally accepted that the right to property is not absolute. This right has always been regarded as being subject to eminent domain, an inherent right of the state and an essential part of the state sovereignty (Ghosh, 1973). Eminent domain (Ghosh, 1973) is subjected to two essential conditions: private property is to be taken only for public use; and just compensation must be paid for the property taken (Keith, 1984) The relationship of law and property and how property gains recognition through law was rightly shown by Jeremy Bentham in ‘Principles of the Civil Code’ (Bentham, 1838: 43). He said that: “The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed,

according to the nature of the case. Now this expectation, this persuasion, can only be the words of law which guarantees it to me...Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases”.

The Declaration of the Right of Man 1789 rated property second only to liberty (Duguit, 1917-18). The gist of the provision is incorporated in many modern constitutions which accord constitutional protection to property as an over-riding fundamental right. Article 17 of the Declaration of Human Rights 1948 clearly states that “everyone has the right to own property alone as well as in association others” and “No one shall be arbitrarily deprived of this property.” The same principle is further emphasized in Article One of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms and provides to the same effect:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest, and subject to the conditions provided for by laws and by the general principles of international law”.

“The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contribution or penalties”.

Despite recognition of right to property, Islam recognizes the public right and interest and that should prevail against any individual interest. Thus, when there is clear needs of the public on certain facilities that require a privately owned land to be acquired, if the purpose is clearly for the public to enjoy, thus the land owner has no right to withhold his land unless for valid cause in the eyes of the law. The issue is what determines public interest. The Malaysian law clearly states that the government is the only authority to determine what amounts to public interest (*Yew Lean Finance Development (M) Sdn Bhd v Director of Lands & Mines, Penang* MLJ 2, 1977: 45). Again, when there is a lot of discretion given to the authority, the tendency to have In Islam, the real ownership of anything in this world including land belongs to Allah swt. Man being the *khalifah* (vicegerent) holds property in trust for which he is accountable to him in accordance with the clearly laid down economic philosophy of Islam:

Behold, thy Lord said to the angels: “I will create a vicegerent on earth”. They said: “Wilt Thou place therein one who will make Mischief therein and shed blood? Whilst we do celebrate Thy praises And glorify thy holy (name)?” He said: “I know what ye know not”. (Sûrah al-Baqarah: 30)

It is He Who hath made You (His) agents, inheritors Of the earth: He hath raised You in ranks, some above Others: that he may try you In the gifts He hath given you: For thy Lord is quick In Punishment: Yet He Is indeed Oft-forgiving, Most Merciful. (Sûrah al-An‘âm: 165).

Islam recognizes the individual’s property and permits the ownership of all types of property acquired by lawful means. Being the recognized owner-trustee of the property, man deal with his property including selling, charge, to create *hibah* (gift), to pass through inheritance etc. The role

of man in dealing with property is explained in many verses of Al Qur'an. "And for men is the benefit of what they earn. And for women is the benefit of what they earn." (4:32), "And give to orphans their property, and don't substitute the worthless (things) for good ones." (4:02).

One of the principles of property right in Islamic law is the legitimate acquisition of property as the sanctity and right to defend property and has to be recognized and upheld in principle and in practice. As such, Islam determines clear punishment for those who transgress the law and failure to observe the law is regarded as an act against the sanctity of Islam and its belief.

There are Quranic verses and saying of the Prophet (saw) to this effect: "And (as far) the man and woman who committed theft, cut off their hands as punishment for what they have earned, an exemplary punishment from Allah." (5:38). "And swallow not up your property among yourselves by false means." (2:188). Another restriction is not to allow use of property to cause harm or problem against other people. Prophet (saw) once said: "One should not harm himself or others" (Narrated by Muslim).

All the available resources exist by nature may be utilised freely, and everyone is entitled to benefit from them according to his needs. There should be no monopoly in the use of water and springs, timber in the forests, fruits of wild plants, wild grass and fodder, air, animals of the jungle, minerals under the surface of the earth and similar other resources, nor can restrictions of any sort be imposed on their free use by Allah's creatures to fulfill their own needs. Nevertheless, the authority may impose taxes for people who want to use any of these things for commercial purposes. Or, if there is misuse of the resources, the Government may intervene. The right to property does not allow for the unattended, leaving idle or underused of things created by Allah swt. It must be utilized for the benefit of mankind and other God's creatures or forfeiture may be initiated by the government. One should either benefit from them or make them available to others. Under the old land tenure system of the Malays, whoever took possession of anything and made it useful in any manner became its owner. It indicates that the man acquired the right to use the land specifically for his own purpose and to obtain compensation from others if they wanted to use it (Maxwell, 1884: 72-200). This is the natural basis of all the economic activities of mankind.

C. Private Ownership in Islam

Private ownership in this paper means the ownership of whatever one can own, including skills, special ability, knowledge, etc. Private ownership in Islam is a right for individuals to conceptually and physically own and have control but a right which also includes responsibility (Sader, 1350, 374). For example, in *Surah al-Baqarah*, Allah swt says "And do not eat up your property among yourselves for vanities, nor use it as bait for the judges, with intent that you may eat up wrongfully and knowingly a little of (other) people's property" (Verse: 188). There is a broader responsibility toward society for personal property which certainly limits its use. Unlike Islam, the capitalistic uses private property in any way the owner wishes.

It is emphasized in the Al-Quran that nobody, including authorities, can invade other people's property (Verse:188). Furthermore, even authorities are responsible to God for the public property. It should be noted that while private ownership in Islam is absolutely recognised, it has its own characteristics which make it completely different from other religions, namely:

1. while individuals have an absolute right to own property, their ownership is limited;
2. they can own a property permanently in this world and/or benefit from its consumption in this world and in the next world;
3. while an individual owns his property the society relationship with the property is not disconnected, and finally
4. there is a time limit on the ownership.

D. The Limited Ownership of Property

Ownership creates a right to have control over a property i.e. to consume it, use it as a means of production or save it. Although, legally, man is declared to be the owner of a piece of land but the ownership is not absolute and subject to various other provisions within the same statute (Section 44 of the National Land (NLC) 1965 provides for the right and enjoyment of land subject to the NLC, other laws and also for reasonable, necessary and lawful use of the land) or others. It is always claimed that rights always come with duties. Similar to common law principles, Sha'riah puts some restrictions on the use of an individual's property such as an individual cannot consume it wastefully, or use it in the production of unlawful goods like alcoholic beverages, gambling, etc. In fact, in Islam, individuals are only the trustee and not the owner of their property. It should be mentioned that some economists (Sader (1349) in monzer.kahf.com, p. 176, viewed On 31st January, 2013) suggest that the regulatory authority should design the regulations in such a way to enforce this idea (Surah al Fatir: 39 "He it is the one that has made you inheritors on the earth...", or Surah (Yunus): 14 "Then We made you heirs in the land after them, to see how you would behave").

God has created everything, including knowledge and abilities, for our use, and He has given to some people more than to others. These are clear from the following verses in the Quran: "It is He who has created for you all things that are on earth...", (Al Qur an, *Al Baqarah*: 29) and "It is He Who has made you (His) agents, inheritors of the earth; He has raised you in ranks; some above others; that He may try you in the gifts He has given you; For the Lord is quick in punishment; Yet He is indeed oft-forgiving, most merciful" (Surah *Al An'am*: 165). In short, wealth is a gift from God, and so, those with more wealth carry heavier responsibilities to God and society. The accumulation of wealth or the ownership of wealth in Islam is not a goal, but a means of production and satisfying needs (Sader, in monzer.kahf.com. 1349, p. 181., viewed 31st January 2013). In fact, men are discouraged in the Qur-an from accumulating wealth for the sake of accumulation, as the Holy Book foretells a painful doom for the people who engage themselves in such vices (Surah *at Taubah*: 34-35).

In Islam, one cannot consider owning a property unless he uses it for consumption, investment, depreciation and/or gives it away to charity. A hadith (saying) of the Prophet Muhammad which says “You do not have any right to your properties, except the part you consume or give to charity. The charity part remains forever” (Sader, 1349: 182.). It can be summarized that (a) an idle property cannot belong to anybody except the society; (b) the only thing you really own in this world is what you consume; and (c) what you give away as charity remains for you forever (in this world and in the next world).

In Islam, the right to use, own and give away the entire property of a person is done *inter vivos* and distribution of property after death has been determined in the al-Qur-an (Surah Al Baqarah: 180 and 240; Surah 4 An-Nisaa: 7-9, 11-12, 19, 33, and 176; and Surah Al-Maidah: 109-111.) It shows that private ownership in Islam is different from that of capitalism in which individuals have an absolute right to their property in this world and in the hereafter. Private ownership in Islam is different from private ownership in capitalism, since in the latter, the ownership indicates that the individual can own the natural resource and determine its ownership(s) after his death as he wishes. Islam being a way of life provides a comprehensive guideline which determine what a people can do and otherwise. Any act against the guideline shall be considered as sinful and is punishable in this world and in the hereafter. For example, according to many Islamic scholars, individuals can only determine the ownership by writing a will of his property after their death. In one instance, the Prophet (saw) recommended Sa’d b. Abi Waqqas to give away in the name of God only one-third of his property after his death. (Imam Malik, ch. 58, p. 330).

Private ownership in Islam is provisionally recognised, by which it means, the more an individual owns, the more responsibility he has, through what he owns, towards society. In Islam, everything belongs to God. The accumulation of wealth is not a goal, and if the wealth is accumulated it is only to be used for worshipping God. The poor and destitute have a right to a portion of the property of fortunate individuals in the society. It is one of the duties of an Islamic state to protect the legal rights of individuals and, at the same time to compel them to fulfill their obligations to the community as enjoined by law. That is how Islam strikes a balance between individualism and collectivism. As such, it is important for the acquiring authority to ensure payment of adequate compensation on time to the deserving parties so that the affected parties should not experience a situation which is worse than before the acquisition.

Man’s right to property must be balanced with the right of the public. In this respect, it is viewed that the current practice in the Malaysian land system is very much in line with Islam. Nevertheless, the recognition of the principles that Allah is the real owner and the man is only the owner-trustee must be manifested in a clearer principle such as to have a clear statement in the Preamble to indicate a similar effect and meaning. In Islam, man is not considered to be the ultimate owner of property and wealth because he is not the creator whilst Allah swt is the creator of men as well as land and wealth and any other things exist in this world. In this regards, man’s right to enjoy the property must always be subject to the rules laid down by Allah swt in al

Qur'an and Hadits.

In the management of acquisition of private property, the government should intervene in order to ensure that process of acquisition is not in contradiction with the interest of the society in general. This could be materialized with the laws and rules as well as policies to protect both, the interest of the public and the private. The door is open for the Islamic government to play its constructive role in the development of the state through compulsory land acquisition on the condition that there should be a real *maslahah* (public interest). From the above discussions it could be said that State has a role to protect and preserve the rights of private property. It is shown also that the law may give effect to the most far reaching interventions in private property rights. Nevertheless, it is to be noted that the legislator owes the greatest respect to preserve the said right he has himself produced. As such, the law on land acquisition must contain all the fundamental elements of human rights though property right is not part of fundamental right.

E. Land Rights in Malaysia

Malaysia has various laws governing matters pertaining to land and ownership. Section 40 of the National Land Code declares that all lands other than alienated land, reserved land and mining land are state land and belongs to the state (Section 40 of the National Land Code 1965; Section 42 relating to power of the State Authority to dispose lands). Section 340 (1) of the National Land Code 1965 declares that any person whose name is registered as the owner of any land obtains an indefeasible title over the land. His rights to enjoy and use the land are exclusive but not absolute and nobody can deny his rights unless the cause of his ownership is tainted by the circumstances mentioned under section 340 (2). Nevertheless, the National Land Code also provides some grounds which allow the State Authority being the authorized body in relation to land to forfeit or receive land in the case of private land when it reverts to the State. As discussed earlier, the Federal Constitution allows for compulsory acquisition of private land save in accordance with law. Based on Article 76 of the Federal Constitution, any law may be enacted for uniformity of the law in which the Land Acquisition Act 1960 was introduced throughout Peninsular Malaysia. Article 13 stipulates that no person may be deprived of property save in accordance with law and no law may provide for compulsory acquisition or for the use of property without adequate compensation. In addition, Article 83 set out detailed procedures for land compensation as stipulated by the Federal Constitution and to ensure that land is acquired for public purposes with adequate compensation as determined under Schedule 2 of the Act. Adequate compensation, therefore, as stated under the provision of Article 13(2) of the Federal Constitution refers to the amount of compensation which is decided considering all principles stated under the First Schedule of the Land Acquisition Act 1960. Even though the State Authority, under the provision of Land Acquisition Act 1960, has the power to make use any private land, it does not allow the authority to violate one's right on their private properties.

Another issue that has been raised relates to the term "save in accordance with the law".

There are arguments saying that such terms may allow rooms for the Parliament to pass any law, however, unreasonable, to deprive an individual of his right to property. Such contention may be not unreasonable looking into the past experience of Malaysian law on acquisition which prior to the amendment 1991 has allowed for acquisition of private land for any purpose on behalf of any acquiring authority. Moreover, some of the provisions under the Land Acquisition Act 1960 do not contain a clear cut off date for the payment of the adequate compensation which has resulted in unreasonable delay by the acquiring agency or the government.

The use of the LAA for the purpose of development is understood as some land owners refuse to depart with their properties for various reasons. Moreover, the government is guided with a strict procedure laid down in the LAA as well as other laws. Among others; the principles of 'natural justice' should be applied in a situation where the applicant's right to be heard was neglected by the authority (*Lai Tai v Collector of Land Revenue* M.L.J., 26:1960: 82). It is essential that the intention as well as the provisions of the law be observed as it is a matter of natural justice that before property is taken compulsorily and compensation fixed, the owner should be made aware of the proceedings, where it is humanly possible to do so and to ensure that he has the right to be heard (*Lai Tai v Collector of Land Revenue* (M.L.J. 26, 1960: 85). The law also provides for the acquiring authority a wide base of purpose to acquire private land under section 3 of the Act. The meaning of 'public purpose' has been challenged in court and discussed at various forums, nevertheless, the provision is always seen as having a broad scope which allows the acquiring authority that is the State Authority to acquire land for private but which the benefit is claimed to be enjoyed by the public as well as the government.

In *S Kulasingam & Anor v Commissioner of Lands, Federal Territory and Others* (MLJ, 1982: 204): "The expression "public purpose" is incapable of a precise definition. No one in fact has attempted to define successfully. What all the textbooks have done is to suggest the test to be applied in determining whether a purpose is public purpose. Various tests have been suggested. But in my view it is still best to employ a simple common sense test, that is, to see whether the purpose serves the general interest of the community.

Arulanandom J in *Yew Lean Finance Development (M) Sdn Bhd v Director of Land and Mines, Penang* (MLJ 2, 1977: 45) came to the conclusion that: "Now, therefore, Government is the sole authority to decide what is, or what is not, a public purpose, and the decision by the Government in this respect cannot be questioned by a Civil Court." The absence of any specific definition on 'public purpose' seems to suggest that the legislature has left it to the Government to say what a 'public purpose' is and to declare the need to a given land for a public purpose (*Somavanti v State of Punjab* AIR 1963 S.C. 151). Ironically, there are not many cases in which the parties made efforts to challenge the meaning of 'public purpose'. The term "public purpose" has not been expressly defined and hence shall always be open for challenge. Parliamentary reluctance has meant the matter is left to the courts to interpret. Unfortunately, the courts have consistently declined to do so. The remedy for the public always depends on the level of honesty and integrity of man,

the State Authority, the acquiring agency, the land administrator, the valuer, the assessor, if any as well as the court.

F. Balancing the Right of the Public and Private Ownership

Another feature of private ownership in Islam is the existence of a continuous connection between the society and private property. It means that even though a property has become privately owned, nonetheless, the public can still claim rights arising from taxes, contribution of *zakah* or *sadaqah*. Furthermore, certain things like running water (rivers), lakes, oil, or similar resources, (e.g., mountains, etc.), cannot be owned by any individual, or by the state. Instead, everyone is equally entitled to derive benefit from them. These goods belong to the whole community, and the state may manage them on behalf of the community, as a trustee, and shall be held accountable. Furthermore, for example, the poor or the needy have a right to a portion of an individual's property. As Niyazi also states, "...in contrast to social stratification conscious conception of property, where the beggar and the destitute are entitled only to charity, the Qur'anic concept of trustee-ownership declares the share of the poor and the needy in the wealth of others as their right" (Niyazee, 1977: 25).

In England, when there are objections by the public, it is always encouraged for the parties to resolve their differences by negotiation. In fact, the people have access to public local inquiry which is governed by the Land Acquisition Act 1981 and the Compulsory Purchase by Non-Ministerial Acquiring Authorities Rules (1980). The latter regulates the procedures to be followed in respect of acquisition by local authorities or any other bodies other than a Minister. In addition, there is also hearing processes which provide an alternative to a public local inquiry. All such efforts provide platforms for deprived owners or aggrieved parties to channel their grievances and dissatisfaction with minimum cost.

In Malaysia, although the right of land owners are heard through a process called inquiry before the payment of compensation is determined by the Land Administrator (Section 12(1) of the LAA 1960) nevertheless, there is still lack of public opportunity to channel dissatisfaction especially before the acquisition is done. For example, there is no opportunity for the public to question the merit of the purported acquisition so that the purpose complies with section 3 of the Land Acquisition Act 1960. In fact it was suggested by the court that 'government is the sole authority to decide what is, or, what is not, a public purpose, and the decision by Government in this respect cannot be questioned by a Civil Court'. Some owners or other affected parties also lack knowledge of their rights and do not know what are they supposed to do when they receive notification about acquisition. The law also provides that the declaration under section 8 is an exclusive evidence of the acquisition and implying that the decision for acquisition is final. Nevertheless, the laws allows for any aggrieved party to bring any dissatisfactions to court as regard to any decision made by the land administrator including the payment for the compensation or damage done to his property due to acquisition process (Section 6(3) of the LAA 1960).

Another common question is whether the land owner or other persons affected by the acquisition can challenge the state authority's decision to acquire land? A review of a long list of court decisions seem to suggest a negative answer unless on two grounds; the state authority failed to follow the procedures stated in the LAA or the State Authority failed to establish 'purposes' under section 3 LAA. In the case of *Syed Omar bin Abd Rahman Alsagoff v Government of the State of Johore* (MLJ 1, 1979: 49) the Privy Council held that "their private interests in or sentimental attachments to their lands cannot override public needs. There are other areas where they can develop their private interests and give new attachments with the compensation which they have received from the Government for the acquisition. If they are dissatisfied with the amount given, they should seek redress in the appropriate manner... people are sentimentally attached to their lands and we are of course sorry for the applicants, but we are regret that the law is clearly on the side of the Government".

In Islam, the land acquisition for public purpose must be carried out according to the condition that has been stipulated by *syara'*. Among the conditions are:

1. The acquisition must be executed by the government or its authorized agent. This is based on Islamic legal maxim "all act of the government towards its people depend on the public interests. In Islam, public interest is always prevailing against private interest;
2. The land acquisition must be for public interest or purpose and that public interest must really exist;
3. Compensation must be paid to the land owner that involved in the land acquisition and the measure of the compensation must be calculated justly and fairly according to the methods that has been determined by *syara'*;
4. The payment of the compensation to the landowner must be made as soon as possible.

G. Right of Government to Acquire Land and Important Principles in Land Acquisition

The constitutions of many countries provide for both the protection of private property rights and the power of the government to acquire land without the willing consent of the owner. There is, however, great variation in its implementation. Some countries have broadly defined provisions for compulsory acquisition, while those of other countries are more specific. In general, constitutional frameworks that have broadly defined provisions focus on basic principles and often simply assert the power to compulsorily acquire land as the single exception to fully protected private property rights. For example, the constitution of the United States of America mandates that: "No person...shall be deprived of...property, without due process of law; nor shall private property be taken for public use without just compensation (Article V)".

Unlike the position in England which allows for various bodies to acquire land, Malaysia adopts a unified system whereby the state governments are the only authorities empowered to acquire land. This resulted from a provision from the Federal Constitution which determines that land is a state matter (Schedule Ninth of List II Federal Constitution 1957). The authorizing provision in

the Land Acquisition Act 1960 is section 3. There are a lot of arguments stating that section 3 provide a broad basis for the acquiring authority to acquire private property for public purpose. In Malaysia, the term ‘public purpose’ was judicially interpreted as having a very broad meaning and it is perceived as giving no legal recourse to challenge the provision (Hamid, 2006, 290). All that is necessary is that it should serve the general interest of the public and the law should be used as a last resort to improve, control and develop better use of land as the population grows (Cheong, 2012: 4.) Vincent J opined that the proper forum to canvass complaint on “public purpose” was to the Parliament with the view to effect legislative reform or to rectify any shortcomings (Abidin, 1945: 410).

In *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors*, (MLJ 1, 1982, :204-208) that: “The expression “public purpose” is incapable of a precise definition. No one in fact has attempted to define successfully. What all the textbooks have done is to suggest that test to be applied in determining whether a purpose is a public purpose. Various tests have been suggested. But in my view it is still best to employ a simple common sense test, that is, to see whether the purpose serves the general interest of the community”. The Supreme Court of India in *Radhy Shyam v. State of U.P.*, (2011) 5 SCC 553 reiterates the principle that the right to property is a constitutional right and government cannot deprive a person of his land in an arbitrary manner. The court further held that “court should view with “suspicion” the action of the government in acquiring land for private parties in the name of urgency. “ Court should not adopt a pedantic approach, and decide the matter keeping in view the constitutional goals of social and economic justice and the fact that even though the right to property is no longer a fundamental right, the same continues to be an important constitutional right and in terms of Article 300-A of the Indian Land Acquisition, no person can be deprived of his property except by authority of law.

A word of caution is worth mention below that: “It is fundamental that compulsory taking of a man’s property is a serious matter and the smaller the man the serious the matter. Hearing him before depriving him is both reasonable and preemptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons” (Iyer, 1980, 322). The right of the state government to acquire land in Malaysia is also protected by virtue of section 68A of the LAA. Under this provision, the right of the state authority is protected in the past as well as in the future. It somehow ensures that the government is safe even if there is a possibility that any subsequent dealings by the subsidiary companies may contravene section 3 of the LAA.

The preceding discussions show that the government has the right to acquire private land in order to enable governments to acquire land for specific purposes provided that the process must be in line with law. It is important to understand that the nature of the powers and the ways in which they are used are invariably sensitive and have wide implications, including from the perspective of international agreements on human rights and their national expressions (FAO Land Study 10, <http://ftp.fao.org/docrep/fao/011/i0506e00.pdf>) Compulsory acquisition is disruptive for those who are affected and whose land is taken and, if done poorly, will have serious negative

impacts on people and their livelihoods. It is important, therefore, that satisfactory approaches are in place and effectively implemented to ensure that communities and people are placed in at least equivalent positions to those before the land acquisition.

Prerequisites for this are appropriate legal frameworks and capacities for implementation, good governance and adherence to the rule of law (FAO Land Tenure Study 9) Good governance in land tenure and administration and the act of acquisition must observe the principles justice and fairness in order to avoid such power to adversely affect the rights of the land owner towards his property. In such situation, it is necessary to have a set of rules or procedures which conforms to the principle of natural justice in order to avoid arbitrary action on the part of the state government. The rules of natural justice has been described as 'one of the law's notable achievements' (Wade, and Forsyth, 1994: 964). In the context of constitutional law, natural justice might be appropriately termed as "constitutional justice" and must consist of at least two established principles that no man shall be judge in his own cause and *audi alteram partem* (Mc Donald v Board na Gcon (1965) I.R. 217). Ibn al-Qayyim, one of the contemporary jurists recommends state intervention in private property if individual owners use their properties against the larger interest of the society. In this connection he infers especially from Hadith *al'Itq* (tradition of emancipation). In this case, a jointly owned slave was freed by one of the masters, but the other master refused to do so. The Holy Prophet(saw) decreed that the just value of the slave be assessed and the other partner be asked to accept his share of it. When it was done, the slave was freed. Referring to this Hadith, Ibn al-Qayyim writes that this tradition provides a basis for the rule that jointly owned indivisible objects may be sold if one of them desires to do so when the sales revenue would be distributed among the partners. The tradition also supports the rule that if someone has to be compensated, he should be compensated by a just price. It appears from the above that the state will have the right to take away something from private hands after paying due compensation in the interest of the community. The concept of ownership and the views on poverty and affluence are closely related. Ibn al-Qayyim exerted himself in applying the concept of private ownership of property and poverty.

Another principle from Ibn al-Qayyim in his economic discussion was public interest (*al-maslahah al'ammah*), *istislah* or consideration of public interest (*al-maslahah al'ammah*) and has become one of the famous principles of Islamic jurisprudence and applied in many efforts towards incorporating Islamic system in this contemporary world. The principles of *maslahah* must be in accordance with the spirit and objectives of the Shariah; it should be logical and rational; and it should be adopted to remove some general hardship. Ibn al-Qayyim emphasises the need for *maslahah* (public interest) for resolving many economic issues which he has been moved by considerations of public interest and has even adopted a view which seems contradictory to some of the teachings of the Shari'ah. But all these emanate from considerations of welfare, to which Ibn al-Qayyim gave great importance. According to him, public interest, that is, interest of the majority has a preference over the private interest. This is consistent with the spirit of *maqasid* Shari'ah (inten-

tion of Shari'ah).

According to Imam al-Ghazali, any ruling for the preservation of the public interest must fulfill three conditions. *First*, the essential necessity (*dharurah*), second – categorical (absolute) (*qat'iyyah*) and thirdly consideration of the majority (Ghazali, 1902: 294-296). The application of these principles in determining adequate compensation for the deprived land owner shall ensure justice is seen and done. This is in line with the definition given in Oxford Advanced Learners Dictionary which defines justice as, “right and fair behavior or treatment.... the quality of being fair or reasonable. Justice in Islam is founded on mutual respect from one human being to another, equal integrity of each person in the society and his loyalty to the state concerned which in turn will make it the duty of the society to provide equally for each person’s pursuit of happiness. In Al Qur’an, Allah swt summarizes the factuality of the public justice by saying: “Allah commands (people) to maintain justice, kindness, and proper relations with their relatives. He forbids them to commit indecency, sin, and rebellion. Allah gives you advice so that perhaps you will take heed” (Surah An-Nahl: 90).

The definition of ‘public good’ within the term “public purpose” under section 3 of the LAA 1960 was challenged for being too loose thus giving much power to the authority to define as it thinks fit. In the latest acquisition for MRT project involving a busy commercial area at Bukit Bintang, Kuala Lumpur, the authority has acquired the land for public transport infrastructures which include MRT station and ancillary retail space within the premises of the station to cover cost of the development. Section 3E of the LAA 1960 provides that the State Authority shall not approve the application for the acquisition of land for any purpose larger in area than that needed for that purpose. The acquisition has received dissatisfaction among the owners, retailers as well as those affected in the process. The LAA must be used and interpreted responsibly by the acquiring authority. This is a clear cut case of abuse of power as well as arbitrary decision making.

Furthermore, the importance of having clear and unambiguous provision in law that provides for specific duration for the process of acquisition was evident in many cases (The *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee*, MLJ 2, 1983: 35; (2) *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors*, MLJ 1, 1986, 362; and It was held by the court that delay of 7 years and 9 years respectively, in paying compensation was in contravention to section 29 of the LAA thus against the Article 13(2) of the Federal Constitution.). Such lacking has resulted in several amendments being made to the Land Acquisition Act 1960. In *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* (MLJ 2, 1983: 35) the Supreme Court affirmed the decision Salleh Abas C.J. (Malaya) (as he then was) in delivering the judgment of the Supreme Court ruled that “We think that it is sufficient to decide this appeal on the basis of a simpler question, i. e. whether or not in view of the long delay resulting in an injustice to the land owner the acquisition was done in accordance with the law (the Land Acquisition Act). Only in the circumstances that it is not done in accordance with the Act can we say that the acquisition is contrary to the requirement of clause (1) of Article 13 of the Federal Constitution which

requires that to be lawful every deprivation of property must be done in accordance with the law (MLJ 3, 1983: 37). Every exercise of statutory power must not only be in conformity with the express words of the Statute but above all must also comply with certain implied legal requirements. The court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant consideration or with gross unreasonableness. Although cases questioning the intention of the government in the acquisition were found as baseless by the court, (*Yap Seok Pen v The Government of Kelantan*, MLJ, 1986: 449); *Stamford Holding Sdn Bhd v The State Government of Johore*, (1998) 2 AMR 997) the matter should give a lesson to the acquiring authority to be more concern, just and putting themselves on the shoes of the deprived land owners rather than having inclination towards the acquiring agency. It is sad that there is no case law on the allegation of conspiracy between the acquiring authority and the acquiring agency. The allegations of bad faith (*mala fide*) on the part of the acquiring authority were also equally disastrous. This is because “bad faith” is an exceedingly serious allegation to make and she who makes it has a heavy burden to discharge the onus of proving it. Mere suspicion is not enough (*Yeap Seok Pen v. Government of Kelantan* (MLJ 1, 1986: 449), Lord Griffiths at p. 451; see also *Syed Omar b. Abdul Rahman Taha Alsagoff & Anor v. Government of Johore* MLJ 1, 1979: 49).

The question is what is the ‘convenient speed’? Does it mean ‘as soon as possible’ or ‘within a reasonable time’, and not ‘as late as possible’? Obviously what amounts to ‘convenient speed’ must vary from case to case. In *Ong Gaik Kee’s* case, it was held that a seven years delay in holding the inquiry is certainly not a ‘convenient speed’ as it is so far outside the normal period of time that no reasonable authority could ever regard it as reasonable. That being the case the court is entitled to strike down the impugned acquisition proceedings as illegal (*Regina v. St. Albans Crown Court, Ex-parte Cinnamond* [1981] Q. B. 480; *Regina v. Tottenham Justices, Ex-parte Dwarkados Joshi* (1982) 1 W. L. R. 631).

A study in Malaysia (Alias and Daud, 2006: 37.) shows 4 important reasons of objections for land acquisition by the government. The highest score in the list of objection is where the respondents believe the payment of objection is inadequate while purpose not purely for public ranked second. Interestingly, no results showed the mean score of more than 4.0. This means that the respondents were not in dispute as to the importance of all the reasons given. However, the collective attitude of society or the community against compulsory purchase is not mirrored in the attitude of most individuals whose land is acquired for public purpose who are, in fact, contented with their deal with the acquiring authorities (Dundas & Evans, 2001; Gordon, 1989). In the study, there are no other reasons were given by respondents for objecting to the compulsory acquisition thus shows that in general the public has no objection to the need for acquisition as a means to provide better infrastructures or services to the society. Some of the objections were raised when the government failed to materialize the “purpose” of acquisition or chose to change the “purpose” as stated in the notification for the acquisition.

III. CONCLUSION AND PROPOSAL FOR REFORMS

Despite the law, there are other mechanism that can be employed to ensure people get better rights and feel nothing to lose when their land are acquired by the government. Looking to the United States as an example of a country that exercises eminent domain concept, negotiation with land owners before resorting to acquisition is favourable and effective. Furthermore, the definition of compensation should be widened to include severance, injurious affection and disturbance compensation. In Malaysia, the law has not defined “adequate compensation” thus leads to practitioners relying on the concept of market value provided by the LAA and interpreted by the courts. It is very important to understand that the concept of adequate compensation is to ensure that people will not be put in a worse position after acquisition. In many land acquisition cases, people suffer more than they gain which may be seen in many aspect in terms of delay, emotional distress, lack of adequate compensation, the dilemma to be in court and etc. As such, the affected landowner can be offered a share scheme in the proposed project on their land if the plans are on commercial nature. In the event when the proposed purpose for acquisition does not materialize, the land owner should be given the chance to ask back their land within certain period and condition. A relook on the effectiveness of s 68A of the LAA may need to be done especially if “public purpose” has not been proven under section 3. Again, acquisition of land is to be exercised as a last resort after negotiation and consideration of alternative site and with proper study that may involve the public. Proper land replacement or relocation may be considered as near as possible to the acquired area. Replacement of Malay Reservation land must be done if not no acquisition plan should proceed. Compensation in the form of reinstatement is as close as possible to the principle of “no less no better” and is preferable to cash payment but both options should be offered to the landowners. The integrity of those involved in the acquisition process must be strengthened from time to time. Any act of favouring the acquiring agency is unethical. The acquiring agency must show proof of ability to pay compensation to the landowners with consideration of increased value after objection and reference to the court or no acquisition can be allowed. In other words, the needs to prove “public purpose” or community good is not the only element to be considered by the State Authority and those involve in the land office but the ability to pay adequate compensation on time is necessary so that no injustice to be seen and done.

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ENDNOTES

- ¹ I would like to acknowledge the help of my colleagues: Dr. Farid, Dr. Ainul Jaria and Dr. Umar Oseni in preparing this keynote address.
- ² Sally Falk Noore, *Law As Process* (London,1978). 1.
- ³ Robert Mnookin, *Bargaining With the Devil: When to Negotiate, When to Fight*, New York: Simon & Schuster, 2010, p. 262.